



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.2.2008
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Proposal for a

COUNCIL REGULATION

terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, inter alia, in Ukraine

(presented by the Commission)

EXPLANATORY MEMORANDUM

CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

This proposal concerns the application of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, as last amended by Council Regulation (EC) No 2117/2005 of 21 December 2005 ('the basic Regulation') in the proceeding concerning imports of ammonium nitrate originating in Ukraine.

General context

This proposal is made in the context of the implementation of the basic Regulation and is the result of an investigation which was carried out in line with the substantive and procedural requirements laid out in the basic Regulation.

Existing provisions in the area of the proposal

The measures currently in force are imposed by Council Regulation (EC) No 132/2001, as last amended by Council Regulation (EC) No 442/2007 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Ukraine.

Consistency with the other policies and objectives of the Union

Not applicable.

CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation of interested parties

Interested parties concerned by the proceeding have had the possibility to defend their interests during the investigation, in line with the provisions of the basic Regulation.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

This proposal is the result of the implementation of the basic Regulation.

The basic Regulation does not foresee a general impact assessment but contains an exhaustive list of conditions that have to be assessed.

LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

On 19 December 2006, the Commission initiated an interim review of the measures in force in respect of imports of ammonium nitrate originating in Ukraine further to a request made by one exporting producer in Ukraine, namely Azot Cherkassy. The request was based on prima facie evidence that the circumstances on the basis of which measures were established have changed and therefore the continued imposition of

measures at the existing levels would no longer be necessary to offset dumping.

The attached proposal for a Council Regulation is based on the findings of the investigation carried out which is limited in scope to the examination of dumping as far as the applicant is concerned.

The investigation showed that dumping took place during the investigation period. The level of the dumping found was higher than the one during the investigation period which led to the imposition of the definitive duties. It was also higher than the injury elimination level which forms the basis of the current measures in force. Therefore, no circumstances have changed in such a way as to no longer render necessary the existing measures to offset dumping. It was also found that the circumstances during the current investigation period were of a lasting nature.

It is therefore proposed that the Council adopt the attached proposal for a Regulation that would terminate the review without amending the anti-dumping measures currently in force, which should be published in the Official Journal no later than 18 March 2008.

Legal basis

Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, as last amended by Council Regulation (EC) No 2117/2005 of 21 December 2005.

Subsidiarity principle

The proposal falls under the exclusive competence of the Community. The subsidiarity principle therefore does not apply.

Proportionality principle

The proposal complies with the proportionality principle for the following reasons:

The form of action is described in the above-mentioned basic Regulation and leaves no scope for national decision.

Indication of how financial and administrative burden falling upon the Community, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective of the proposal is not applicable.

Choice of instruments

Proposed instruments: regulation.

Other means would not be adequate for the following reason: The above-mentioned basic Regulation does not foresee alternative options.

BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

Proposal for a

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terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, inter alia, in Ukraine

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community¹ ('the basic Regulation'), and in particular Article 11(3) thereof,

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

A. PROCEDURE

1. Measures in force

- (1) On 22 January 2001 the Council imposed, by Regulation (EC) No 132/2001², a definitive anti-dumping duty (the "existing measures") of EUR 33,25 per tonne on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating, inter alia, in Ukraine. The investigation that led to these measures will be referred to as the "original investigation".
- (2) On 17 May 2004, following a partial interim review, by Regulation (EC) No 993/2004³ the Council exempted from the anti-dumping duties imposed by Regulation (EC) No 132/2001 imports to the Community of the product concerned produced by companies from which undertakings would be accepted by the Commission. By Commission Regulation (EC) No 1001/2004⁴, undertakings were accepted for a period of 6 months and by Commission Regulation (EC) No 1996/2004⁵ for a further period until 20 May 2005. The purpose of these undertakings was to take account of certain consequences of the enlargement of the European Union to 25 Member States on 1 May 2004.
- (3) By Regulation (EC) No 945/2005⁶, following an interim review limited in scope to the definition of the product concerned, the Council decided that the definition of the product concerned should be clarified and that the measures in force should apply to

¹ OJ L 56, 6.3.1996, p. 1 Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

² OJ L 23, 25.1.2001, p.1

³ OJ L 182, 19.5.2004, p. 28

⁴ OJ L 183, 20.5.2004, p. 13

⁵ OJ L 344, 20.11.2004, p. 24

⁶ OJ L 160, 23.6.2005, p. 1

the product concerned when incorporated in other fertilizers, in proportion to their content of ammonium nitrate, together with other marginal substances and nutrients.

- (4) Following an expiry review initiated in January 2006, the Council, by Regulation (EC) No 442/2007⁷, renewed for two years these measures at their current level. The measures consist of specific duties.

2. Request for a review

- (5) A request for a partial interim review pursuant to Article 11(3) of the basic Regulation was lodged by Open Joint Stock Company (OJSC) Azot Cherkassy ('the applicant'), an exporting producer from Ukraine. The request was limited in scope to dumping as far as the applicant is concerned.
- (6) In its request pursuant to Article 11(3) of the basic Regulation, the applicant claimed that the circumstances with regard to dumping, on the basis of which the measures in force were established, had changed and that these changes were of a lasting nature. The applicant further alleged that a comparison of normal value based on its own costs or domestic prices and export prices to the Community would lead to a reduction of dumping significantly below the level of the current measures. Therefore, it claimed that the continued imposition of measures at the existing levels was no longer necessary to offset dumping.

3. Investigation

- (7) Having determined, after consulting the Advisory Committee, that the request contained sufficient *prima facie* evidence, the Commission announced on 19 December 2006 the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation by a notice of initiation published in the Official Journal of the European Union⁸.
- (8) The review was limited in scope to the examination of dumping in respect of the applicant. The investigation of dumping covered the period from 1 October 2005 to 30 September 2006 ('the review investigation period' or 'RIP').
- (9) The Commission officially informed the applicant, the representatives of the exporting country and the association of Community producers about the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation.
- (10) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.
- (11) In order to obtain the information deemed necessary for its investigation, the Commission sent the questionnaire to the applicant and received the reply within the deadline set for that purpose.
- (12) The Commission sought and verified all information deemed necessary for the determination of dumping. The Commission carried out verification visits at the premises of the applicant in Cherkassy.
- (13) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to recommend to terminate the present review and to

⁷ OJ L 106, 24.4.2007, p. 1

⁸ OJ C 311, 19.12.2006, p. 57

maintain the existing anti-dumping measures on imports of the product concerned by the applicant and were given an opportunity to comment. The comments received were duly considered and taken into account, where appropriate.

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

- (14) The product concerned is the same as in the original investigation as clarified by the Council Regulation (EC) No 945/2005 mentioned in recital (3), i.e. solid fertilizers with an ammonium nitrate content exceeding 80 % by weight originating in Ukraine, falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91 (hereinafter referred to as "AN"). AN is a solid nitrogen fertiliser commonly used in agriculture. It is manufactured from ammonia and nitric acid, and its nitrogen content exceeds 28 % by weight in prilled or granular form.

2. Like product

- (15) This review investigation confirmed what was established in the original investigation - that AN is a pure commodity product, and its quality and basic physical characteristics are identical whatever the country of origin. The AN manufactured and sold by the applicant on its domestic market in Ukraine and the one exported to the European Community have the same basic physical and chemical characteristics and essentially the same uses. Therefore, these products are considered to be like products within the meaning of Article 1(4) of the basic Regulation. Since the present review was limited to the determination of dumping as far as the applicant is concerned, no conclusions were reached with regard to the product produced and sold by the Community industry in the Community market.

C. RESULTS OF THE INVESTIGATION

1. Normal value

- (16) In order to establish the normal value, it was first verified that the total domestic sales of the applicant were representative in accordance with Article 2(2) of the basic Regulation, i.e. that the total volume of such sales represented at least 5 % of the total export sales volume of the applicant to the Community. The investigation showed that the applicant sold only one type of AN and that this type was sold in representative quantities on the domestic market.
- (17) The Commission subsequently examined whether the domestic sales of AN could be regarded as having been made in the ordinary course of trade in accordance with Article 2(4) of the basic Regulation, by comparing domestic net sales price with the calculated cost of production.
- (18) When assessing the cost of production of the applicant, it was found that gas costs were not reasonably reflected in the records of the applicant. It should be noted that energy costs, such as gas, represent a major proportion of the manufacturing cost and a significant proportion of the total cost of production.
- (19) As regards gas costs, it was found that Ukraine is importing the majority of the gas consumed in the production of AN from Russia. In this regard, all available data indicates that Ukraine imports natural gas from Russia at prices which are significantly below market prices paid in unregulated markets for natural gas. The investigation revealed that the price of natural gas from Russia when exported to the European

Community was approximately twice as high as the domestic gas price in the Ukraine. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by the applicant were adjusted on the basis of information from other representative markets.

- (20) Following disclosure, the applicant argued that any adjustment of its gas price paid on the domestic market would be unwarranted because the accounting records of the company fully reflected the costs associated with the activity of production and sales of the like product in the country of origin.
- (21) However, when examining cost of production of the like product under Article 2(5) of the basic Regulation, it must be determined whether the costs as booked in the company's accounts are *reasonably* reflecting the costs associated with the production and sale of the product under investigation. For the reasons set out above in recital (19), this was found not to be the case.
- (22) Furthermore, the applicant claimed that its normal value should be based on its sales of the product concerned on its domestic market alleging that there is no reason to consider that these sales were not made in the ordinary course of trade. In this regard, it should be noted that in order to establish whether domestic sales were made in the ordinary course of trade by reason of price, i.e. whether they were profitable, it must first be established whether the costs of the applicant were a reliable basis within the meaning of Article 2(5) of the basic Regulation. Only after costs have been reliably established, can it be determined which methodology to establish normal value should be used. As outlined in recital (28) below and following, since the comparison of domestic net sales price with the adjusted cost of production during the RIP showed that no domestic sales were made in the ordinary course of trade. Therefore, domestic prices of the applicant could not be used for the establishment of the normal value.
- (23) The applicant also argued that the investigation was based on data during the RIP and that the conclusions did therefore not take into account developments after this period such as, in particular, the continuous increase of gas prices and the increase in domestic consumption of fertilisers in Ukraine. In this respect, it should be recalled that in accordance with Article 6(1) of the basic Regulation, for the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding. It is also recalled that in line with usual Community practice, the RIP concerning dumping had a duration of one year.
- (24) It was considered whether the development of gas prices in Ukraine subsequent to the RIP should have been taken into consideration when determining the dumping margin of the applicant. In this regard, it should be noted that in accordance with Article 6(1) of the basic Regulation, information relating to a period subsequent to the investigation period shall, normally, not be taken into account. In line with consistent Community practice, this was interpreted as meaning that events relating to a period subsequent to the IP can only be taken into account if they are manifest, undisputed and lasting. In this regard, although an increase in gas prices could be observed after the RIP, it could not be established with sufficient certainty that this price increase was indeed of a lasting nature. It was found that the information available on future developments of gas prices in Ukraine consisted in mere previsions rather than verifiable information in relation to actual gas prices. Article 6(1) allows the use of information and data outside the IP (or in cases of reviews the RIP) only under very exceptional circumstances. The situation in the present case was not considered such

as to justify the use of data or information outside the RIP. Furthermore, the applicant did not substantiate its arguments as no evidence was submitted to show that data relating to a period after the RIP are more representative than those relating to the RIP. The argument was therefore rejected.

- (25) As for the fact that the consumption of fertilisers in Ukraine has increased after the RIP, the applicant did not explain or show to what extent this fact could have an impact on the findings made on the basis of the information related to the RIP. Thus, the applicant did not submit sufficient information on the basis of which meaningful conclusions could have been drawn, nor was any other information available which could have supported the applicant's claim in this regard. Since any conclusions on this basis would have been speculative the applicant's claim was rejected.
- (26) The adjusted gas price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs. Waidhaus, being the main hub for Russian gas sales to the EU, which is both the largest market for Russian gas and has prices reasonably reflecting costs, can be considered a representative market within the meaning of Article 2(5) of the basic Regulation.
- (27) The applicant further argued that Ukraine purchases gas at similar market conditions as the European Community and that the prices paid for gas by the applicant in 2007 were higher than the gas price at the Ukrainian-Russian border in the same period. However, the applicant did not submit any evidence to substantiate its claims and has thus failed to show that the conditions mentioned above in recital (24) for taking into account events relating to a period subsequent to the RIP are fulfilled. The argument was therefore rejected.
- (28) The comparison of domestic net sales price with the adjusted cost of production during the RIP showed that no domestic sales were made in the ordinary course of trade pursuant of Article 2(4) of the basic Regulation.
- (29) It was therefore considered that domestic prices did not provide an appropriate basis for the establishment of the normal value and another method had to be applied. In accordance with Articles 2(3) and 2(6) of the basic Regulation, normal value was constructed by adding to the applicants manufacturing costs of the product concerned, adjusted where necessary as mentioned in recital (19) above, a reasonable amount for SG&A costs and a reasonable amount for profit.
- (30) SG&A costs and profit could not be established on the basis of the chapeau of Article 2(6) of the basic Regulation because the applicant did not have representative domestic sales of the product concerned in the ordinary course of trade. Article 2(6)(a) of the basic Regulation could not be applied, since only the applicant is subject to the investigation. Article 2(6)(b) was not applicable either, since the manufacturing cost of the applicant for products belonging to the same general category of goods would also need to be adjusted in respect of gas costs, for the reasons indicated in recital (19) above. Therefore, SG&A costs and profit were established pursuant to Article 2(6)(c) of the basic Regulation.
- (31) The North American market showed a significant volume of domestic sales and a considerable level of competition from both domestic and foreign companies. In this respect, consideration was given to publicly available information relating to major companies operating in the fertilizers business sector. It was found that the corresponding data from North American (USA and Canadian) producers would be the most appropriate for the purpose of the investigation, given the large availability of

reliable and complete public financial information from listed companies in this region of the world. Therefore, SG&A costs and profit were established on the basis of the weighted average SG&A costs and profit from three North American producers, which were found to be amongst the largest companies in the nitrogen fertilizers' sector, with regard to their domestic sales of the same general category of products (nitrogen fertilizers). These three producers were considered to be representative of the nitrogen fertilizers' business and their SG&A costs and profit thereby representative of those normally incurred by companies operating successfully in that business segment. It should be noted that there were no indications that the amount for profit so established exceeded the profit realized by other Ukrainian producers on sales of products of the same general category on their domestic market.

- (32) Following the disclosure the applicant alleged that there is a significant difference between the market situation between the North America and Ukraine. The applicant however failed to explain the alleged difference and to substantiate its claims. It also failed to propose any other reasonable basis for calculations in the absence of which this argument had to be rejected.

2. Export price

- (33) Since the product concerned was exported to independent customers in the Community, the export price was established in accordance with Article 2(8) of the basic Regulation, i.e. on the basis of the export price actually paid or payable.

3. Comparison

- (34) The normal value and export price were compared on an ex-works basis and at the same level of trade. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting price and price comparability in accordance with Article 2(10) of the basic Regulation. Accordingly, adjustments were made for differences in transport, handling, loading and ancillary costs, where applicable and supported by verified evidence.
- (35) After disclosure the association of Community producers argued that the rail tariffs in Ukraine for transport of, *inter alia*, the product concerned when exported to the European Community were artificially low and therefore needed to be adjusted. The investigation did not reveal however that transport costs in Ukraine were not reasonably reflected in the records of the applicant. This claim therefore had to be rejected.

4. Dumping margin

- (36) The dumping margin was established on the basis of a comparison of a weighted average normal value with a weighted average export price, in accordance with Article 2(11) of the basic Regulation.
- (37) This comparison showed a dumping margin of 38,2%, expressed as a percentage of the CIF Community frontier price, duty unpaid.

5. Lasting nature of the changed circumstances

- (38) In accordance with Article 11(3) of the basic Regulation, an analysis was made as to whether the change in circumstances with regard to dumping could reasonably be said to be of a lasting nature.

- (39) In this context, it was noted that the dumping margin currently applicable to the applicant was established in the original investigation using a normal value determined on the basis of data obtained from a producer in a market economy third country in accordance with Article 2(7) of the basic Regulation. However, in the present review normal value was calculated based on information relating to the applicant's own data in accordance with Article 2(1) to (6) of the basic Regulation, following the granting of market economy status to Ukraine (amendment of the basic Regulation by Council Regulation 2117/2005⁹).
- (40) There were no indications that the level of the normal value or the export price established for the applicant in the current investigation could not be considered of a lasting nature. It could be argued that the evolution of the prices of natural gas as the main raw material could have a significant influence on the normal value. It was, however, considered that the effect of the price increase would affect all actors on the market and therefore have an impact on both the normal value and the export price.
- (41) The export price of the applicant to the Community during the RIP was found to be similar to that of its exports to other countries, where considerably higher quantities were sold during the RIP.
- (42) Therefore, although the dumping margin found in the RIP is based on a relatively low volume of exports of the applicant to the Community, there are reasons to consider that the dumping margin found is based on changed circumstances of a lasting nature.

D. TERMINATION OF THE REVIEW

- (43) Since, in the original investigation the duty was imposed in the form of a specific amount per tonne, it should have the same form in the current investigation. The duty calculated on the basis of the current margin of dumping would be EUR 47/ton.
- (44) It is recalled that, as outlined in recital (59) of Council Regulation (EC) No 132/2001, when imposing definitive measures in 2001, the injury margin was used when determining the amount of the definitive duty to be imposed in accordance with the lesser duty rule. As defined by Article 1(2) of Regulation (EC) No 442/2007, the duty currently in force depends on the specific product type and varies between EUR 29,26/ton and EUR 33,25/ton.
- (45) Since the duty established on the basis of the current margin of dumping is higher than the current duty, the review should be terminated without amending the level of the duty applicable to the applicant, which should be maintained at the level of the definitive anti-dumping duty rate established in the original investigation.

E. UNDERTAKINGS

- (46) The applicant expressed an interest in offering an undertaking but failed to submit a sufficiently substantiated undertaking offer within the deadlines set in Article 8(2) of the basic Regulation. Consequently no undertaking offer could be accepted by the Commission. However, it is considered that the complexity of several issues, namely (1) the volatility of the price of the product concerned which would require some form of indexation of minimum prices, while at the same time the volatility is not sufficiently explained by the key cost driver; and (2) the particular market situation for the product concerned (*inter alia*, that there are limited imports from the exporter

⁹ OJ L 340, 23.12.2005, p.17

subject to this review) points to the need to consider whether an undertaking combining an indexed minimum price and a quantitative ceiling would be workable.

- (47) As mentioned above, due to this complexity the applicant could not formulate an acceptable undertaking offer within the statutory deadline. In view of the above, the Council considers that the applicant should exceptionally be allowed to complete its undertaking offer beyond the above-mentioned deadline but within 10 calendar days from entry into force of this regulation.

F. DISCLOSURE

- (48) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to terminate the present review and to maintain the existing anti-dumping duty on imports of the product concerned produced by the applicant. All parties were given an opportunity to comment. Their comments were taken into account where warranted and substantiated by evidence.

HAS ADOPTED THIS REGULATION:

Sole Article

The partial interim of the anti-dumping measures applicable to imports of solid fertilizers with an ammonium nitrate content exceeding 80 % by weight originating in Ukraine, falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91, initiated pursuant to Article 11(3) of Regulation (EC) No 384/96, is hereby terminated without amending the anti-dumping measures in force.

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President